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In the

Supreme Court of the United States

UNITED STATES CORPS OF ENGINEERS,
Petitioner,

v.

HAWKES, CO., INC., et al.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Did Congress grant the Corps of Engineers unreviewable power to require landowners to pursue permits under the Clean Water Act even when there is a dispute as to whether the land in question is covered by the Act?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iii
IDENTITY AND INTEREST OF AMICUS CURIAE 1
SUMMARY OF ARGUMENT 1
ARGUMENT 2
I. Prohibition of Judicial Review of Jurisdictional Determinations Violates Separation of Powers. 2
A. Actual separation of powers is critical to the design of government in the Constitution. 2
B. The Army Corps of Engineers in this case seeks to exercise executive, legislative, and unreviewable judicial power. 5
CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs,
425 F.3d 1150 (9th Cir. 2005) 9
Christopher v. SmithKlein Beecham Corp.,
132 S.Ct. 2156 (2012) 1
Cmty. Assn. for Restoration of the Env't v. Henry Bosma Dairy,
305 F.3d 943 (9th Cir. 2002) 8
Dep't of Transp. v. Ass'n of Am. Railroads,
135 S.Ct. 1225 (2015) 1, 7
Headwaters, Inc. v. Talent Irrigation Dist.,
243 F.3d 526 (9th Cir. 2001) 8
Mingo Logan Coal Company, Inc. v. U.S. Env. Prot. Agency,
70 F. Supp. 3d 151 (D.D.C. 2014) 9
Panama Refining Co. v. Ryan,
293 U.S. 388 (1935) 7
Perez v. Mortgage Bankers Ass'n,
135 S.Ct. 1199 (2015) 1
Precon Dev. Corp. v. U.S. Army Corps of Eng'rs,
984 F Supp. 2d 538 (E.D. Va. 2013) 8
Rapanos v. United States,
547 U.S. 715 (2006) 7, 9, 10
Resource Investments, Inc. v. United States,
151 F.3d 1162, (9th Cir. 1998) 9
Save Our Sonoran, Inc. v. Flowers,
408 F.3d 1113 (9th Cir. 2005) 8
Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng',
531 U.S. 159, 168 (2001) 6, 7

Treacy v. Newdunn Assoc.,
344 F.3d 407 (4th Cir. 2003) 8
United States v. Deaton,
332 F.3d 698 (4th Cir. 2003) 8
United States v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985) 6, 10

Statutes

33 U.S.C. § 1344 6
33 U.S.C. § 1362 6
THE DECLARATION OF INDEPENDENCE, 1 Stats. 1, 2
(1776) 4

Other Authorities

Adams, John, A DEFENSE OF THE CONSTITUTIONS OF
GOVERNMENT OF THE UNITED STATES OF AMERICA,
(1797) (Lawbook Exchange, Ltd. 2001) 3
Montesquieu, THE SPIRIT OF THE LAWS (1748) (Franz
Neumann ed. & Thomas Nugent trans., 1949) 3
Story, Joseph, COMMENTARIES ON THE CONSTITUTION
(1833) (Little Brown & Co. 1858) 4
THE DOCUMENTARY HISTORY OF THE RATIFICATION OF
THE CONSTITUTION, (John P Kaminski, et al. eds.
2009) 4
THE FEDERALIST (Clinton Rossiter ed,. 1961) 3, 5
THE FOUNDERS' CONSTITUTION (Philip B, Kurland &
Ralph Lerner, eds. 1987) 2

Rules

33 C.F.R. § 325.2 9
33 C.F.R. § 325.7 9
33 C.F.R. § 326.5 8
Sup. Ct. R. 37.6 1

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, the Center for Constitutional Jurisprudence[1] was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life. Those principles include that individual liberty is best protected by the design of separated powers. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance addressing separation of powers, including *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199 (2015), *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S.Ct. 1225 (2015); and *Christopher v. SmithKlein Beecham Corp.*, 132 S.Ct. 2156 (2012), to name a few.

SUMMARY OF ARGUMENT

The bar on judicial review sought by the Corps of Engineers in this case would concentrate all three powers of government in the agency. In arguing that its "jurisdictional determinations" are not reviewable, the Corps asserts the power to compel property owners to apply for permits they do not want and do not believe that they need. This case is an example of

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[1] Pursuant to this Court's Rule 37.3 all parties have filed blanket consents to amicus participation with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

what the framers feared when they insisted on a separation of powers in government.

ARGUMENT

I. Prohibition of Judicial Review of Jurisdictional Determinations Violates Separation of Powers.

A. Actual separation of powers is critical to the design of government in the Constitution.

The structural limits on the exercise on constitutional powers were not designed because the founders were "anti-government" or as a means of frustrating democratic self-government. The framers of the Constitution understood the need for a national government to control the problems created by individual state governments competing for trade and intent on avoiding financial obligations. *See* Letter of George Washington to John Jay, August 1, 1786, reprinted in 1 THE FOUNDERS' CONSTITUTION, 162 (Philip B, Kurland & Ralph Lerner, eds. 1987); James Madison, Vices of the Political System of the United States, April, 1787, reprinted in 1 THE FOUNDERS' CONSTITUTION, 167. Instead, these limitations on the exercise of power grew out of the recognition that despite the best intentions, those in power tend to accumulate power at the expense of individual liberty. As James Madison noted, the framers sought to design the government "to be administered by men over men" – that is, one that took account of the shortcomings of human nature. Although the electorate was the primary means in the system they designed of "obliging the

government to control itself," they had enough experience to recognize "the necessity of auxiliary precautions." The Federalist No. 51 at 322 (James Madison) (Clinton Rossiter, ed. 1961).

Separation of powers emerged as the primary structural mechanism that would insure that the government would govern itself. The Founders did not invent this concept. They relied heavily on the writings of Montesquieu, Blackstone, and Locke for their theory about how to design government. *E.g.*, John Adams, A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA, (1797) Letter XXVIII, vol.1 at 154 (Lawbook Exchange, Ltd. 2001) (essay on Montesquieu). Montesquieu explained that, "there is no liberty, if the judiciary power be not separated from the legislative and executive." Montesquieu, THE SPIRIT OF THE LAWS (1748) bk. XI, ch. 6, at 152 (Franz Neumann ed. & Thomas Nugent trans., 1949). He cautioned that if judicial power is joined with legislative power, "the life and liberty of the [governed] would be exposed to arbitrary control." Likewise, if judicial power were joined to the executive power, "the judge might behave with violence and oppression." *Id.* This, he said, "would be an end of everything." *Id.*

There was little argument during the ratification debates challenging the view that separation of powers needed to be an essential component in any new federal government. Even before a national constitution was ever considered, the Founding generation made sure that newly formed state governments were based on separated powers.

The Virginia Declaration of Rights, adopted in June, 1776, insisted that "legislative and executive

powers ... should be separate and distinct from the judiciary. Va. Dec. of Rights, Sec. 5 (1776), reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 530 (John P Kaminski, et al. eds. 2009). The new Virginia Constitution adopted that same month also required that the branches of government be "separate and distinct" and commanded that they not "exercise powers properly belonging to the other." Va. Const. of 1776, in 8 DOCUMENTARY HISTORY, *supra* at 533.

The Massachusetts Constitution of 1780 contained a similar provision, and added the purpose of separated powers "to the end it may be a government of laws, and not men." Mass. Const. of 1780, Part I, Art. XXX, in 4 DOCUMENTARY HISTORY, *supra* at 445.

The denial of separated powers was among the complaints against the crown listed in the Declaration of Independence. THE DECLARATION OF INDEPENDENCE, 1 Stats. 1, 2 (1776) (noting obstruction of the administration of justice and making judges "dependent on his will alone"). Justice Story noted that the first resolution adopted by the Constitutional Convention in 1787 was for a plan of government consisting of three separate branches of government. Joseph Story, COMMENTARIES ON THE CONSTITUTION, § 519 (1833) (Little Brown & Co. 1858).

Indeed, there was no debate about whether the separation of powers would be a feature of the new government. Instead, the question was whether the proposed constitution provided sufficient separation.

James Madison explained that a mere prohibition on exercising the powers of another branch of government was not sufficient. Such a prohibition was a

mere "parchment barrier" between the branches. THE FEDERALIST No. 48 at 166 (James Madison). Thus, the Constitution was designed to give the members of each branch the power to resist encroachment on their powers. THE FEDERALIST No. 51, at 182.

The judiciary, in particular, was designed to serve as a check on the political branches, to ensure that they did not venture beyond their constitutional authority and thereby endanger liberty. As Alexander Hamilton noted, a robust judicial power was necessary if the courts were to serve as "bulwarks" for liberty. The Federalist No. 78, *supra*, at 287 (Alexander Hamilton).

The rise of the modern administrative state proves that the framers' fears were warranted. This case demonstrates that the concentration of all three powers of government in one agency endangers individual liberty – here individual rights in private property.

B. The Army Corps of Engineers in this case seeks to exercise executive, legislative, and unreviewable judicial power.

First, the Corps has used **legislative** power to expand its power under the Clean Water Act from regulating activity that directly affects a navigable waterway to its claim today of regulating even non-navigable waters, including small tributaries and dry channels, thereby displacing the states as the primary regulator of land use. This is a claim of extraordinary legislative power not granted by Congress.

The Clean Water Act empowers the Corps of Engineers to regulate dredging and filling of "navigable

waters" defined as "waters of the United States, including the territorial seas." 33 U.S.C. §§ 1344, 1362. Initially, the Corps interpreted its jurisdiction as encompassing waters that were useable as a channel of interstate or foreign commerce. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs. (Solid Waste Agency)*, 531 U.S. 159, 168 (2001). Although that interpretation appeared to extend to the limit of Congress' authority under the Commerce Clause, the Corps soon began to extend its own power by redefining "navigable waters" much more broadly. This re-definition took place without any new law from Congress. The agency simply decided that the law now meant something different.

This Court acquiesced in the decision of the Corps to expand the reach of the Clean Water Act to a "wetland" that was immediately adjacent to a navigable water. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985). The Corps then decided to stretch the Clean Water Act even further to cover waters that had no connection at all to navigable rivers, lakes, or seas. In *Solid Waste Agency*, the Corps argued that it was sufficient for coverage under the Clean Water Act if migratory water fowl might use the waters. *Solid Waste Agency*, 531 U.S., at 164. This Court ruled that the text of the Clean Water Act would not allow the Corps' attempt to expand its jurisdiction. *Id.*, at 168. Nonetheless, the Corps continues to test the bounds of its jurisdiction to regulate land use.

There are no statutory guidelines that control the Corps' desire to increase its jurisdiction. As noted in *Solid Waste Agency*, the *Riverside Bayview* Court recognized that Congress intended the phrase "navigable waters" to include "at least some waters that would

not be deemed 'navigable' under the classical understanding of that term." *Solid Waste Agency*, 531 U.S., at 171. This Court candidly admitted, however, that the statute gives no guidance "of what those waters might be." *Id.* That is, there is no intelligible principle by which the Court can judge the Corps' claim of authority to regulate "waters" that are not navigable. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935); *Dep't of Transp.*, 135 S.Ct at 1246 (Thomas. J., concurring in the judgment) (noting that the "intelligible principle doctrine does not "adequately reinforce the Constitution's allocation of legislative power.").

The Court again faced the problem of the Corps' expansive assertion of jurisdiction under the Clean Water Act in *Rapanos*. There, the Corps sought to include within its Clean Water Act jurisdiction any land containing a channel through which rainwater might occasionally flow. *Rapanos v. United States*, 547 U.S. 715, 722 (2006) (Scalia, J., plurality opinion) (Scalia, J., plurality opinion). The plurality rejected a reading of the Clean Water Act that would allow regulation of dry channels through which water occasionally flows. *Id.*, at 733. The Corps has chosen not to follow the guidance in the plurality opinion, however. Instead, the Corps claims to follow Justice Kennedy's separate opinion arguing that the Clean Water Act could extend to some dry channels so long as there was a "significant nexus." *Id.*, at 782 (Kennedy, J., concurring in the judgment).

Although the Corps purports to rely on Justice Kennedy's "significant nexus" formulation, their claim of jurisdiction in such cases deprives that formulation of any meaning. *See Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 984 F Supp. 2d 538 (E.D.

Va. 2013) (asserting jurisdiction over a patch of wetlands that sits adjacent to (but does not directly abut) a 2,500-foot manmade drainage ditch, which flows from February through April into another perennial drainage ditch 900 feet away, which runs into a larger tributary about 3,000 feet away, which eventually flows, after approximately three to four miles, into a traditional navigable water); *see also, Treacy v. Newdunn Assoc.*, 344 F.3d 407, 410 (4th Cir. 2003); *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003) (where water from a "roadside ditch" took "a winding, thirty-two-mile path to the Chesapeake Bay"); *Cmty. Assn. for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 954-55 (9th Cir. 2002) (irrigation ditches and drains that intermittently connect to covered waters); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (9th Cir. 2001); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1118 (9th Cir. 2005) (where the Corps was asserting jurisdiction over land where "water courses through the washes and arroyos of the arid development site during periods of heavy rain").

Second, the Corps of Engineers exercises robust **executive power** under the Clean Water Act. The Corps controls whether to issue a permit for "dredge or fill" activity, it controls how long it will take to get a permit, and it controls how expensive the process will be for a property owner. Should a property owner decline to secure the Corps' permission before taking action on property the Corps has deemed to be within its jurisdiction, the Corps decides whether to refer the case for criminal prosecution. 33 C.F.R. § 326.5

In 2002, the average time for processing a permit was more than two-years and the average cost for

property owners exceeded a quarter million dollars. *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (Scalia, J., plurality opinion). While the regulations state that the Corps will act on a permit within 60 days (33 C.F.R. § 325.2(d)), the Corps is in complete control of the process because the 60 day period does not start to run until the Corps decides the application is complete (33 C.F.R. § 325.7(d)(10)).

The 2002 "averages" are exceeded by large projects, especially when there is opposition (either within the Corps or by external groups). In one case, a permit was denied six years after the application was filed, and in another, the permit was granted after four years. *Resource Investments, Inc. v. United States*, 151 F.3d 1162, (9th Cir. 1998) (Appellant's brief at n.15); *Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150, 1152-53 (9th Cir. 2005). The Mingo Logan Coal Company spent millions of dollars on its application and waited nearly 10 years to receive a permit. The Environmental Protection Agency, which also exercises authority under the Clean Water Act, later vetoed the permit. *Mingo Logan Coal Company, Inc. v. U.S. Env. Prot. Agency*, 70 F. Supp. 3d 151, 158-60 (D.D.C. 2014).

The record in this case suggests that the petitioner would be required to spend substantially more than the average, and that it would take several years before a final decision would be rendered. Army Corps personnel have told petitioner that it should not even bother to apply for a permit since the application will require expensive environmental studies that will take a significant time to complete. Even if petitioner invests the time and money into the application, the

Corps personnel have said that the permit will be denied.

Third, the Corps now claims exclusive interpretive, or **judicial**, power to judge whether a parcel of dry land is within the ever-expanding definition of "navigable waters." As noted above, there is no intelligible principle for guiding the Corps' exercise of quasi-legislative power to define the scope of its jurisdiction. In this case, the Corps argues further that it has the power to make an unreviewable quasi-judicial determination as to whether a particular parcel of property is subject to its jurisdiction under the Clean Water Act.

If a property owner cannot obtain immediate judicial review of a jurisdictional determination, the only choice is to pursue a permit from the Corps. This is a permit that the property owner does not want, does not believe it needs, and which the Corps has indicated that it will deny after the owner spends significant sums on environmental studies and puts up with years of delay. The property owner has no choice, however, "because the Clean Water Act 'impose[s] criminal liability,' as well as steep civil fines, 'on a broad range of ordinary industrial and commercial activities.'" *Rapanos*, 547 U.S., at 719 (Scalia, J., plurality opinion).

Without judicial review, the Corps can force a property owner to abandon his property. If the owner decides to pursue the permit, the Corps controls the length and cost of the process. Pursuit of a permit that the law may not even require can come to resemble a Sisyphean task of rolling the boulder up the mountain while the Corps decides it needs new environmental studies or more information, forcing the

owner to start the task all over. The property owner loses under either scenario. This combination of executive, legislative, and judicial power allows the Corps to expand its jurisdiction beyond the reach of Congressional intent without ever having to face judicial review. The separation of powers problem is exacerbated because the Corps will never have to face voters. It simply becomes a government unto itself. This is the tyranny of which Montesquieu warned, and which the framers sought to avoid with their careful crafting of separated powers.

CONCLUSION

The Court should hold that jurisdictional determinations are subject to judicial review in order to avoid a violation of separation of powers.

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Respectfully submitted,

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